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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1511

NELSON G. GROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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OCTOBER TERM, 1974

No.

NELSON G. GROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nelson G. Gross petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on February 19, 1975.

Opinions Below

As of the date of preparation of this petition, neither the Orders of the United States Court of Appeals for the

Third Circuit denying petitioner's Petition for Rehearing (24b)[1] nor the opinion of that court (1b to 22b) is reported. The Opinion of the United States District Court for the District of New Jersey (26b) is reported at 375 F. Supp. 971.

Jurisdiction

The judgment of the Court of Appeals was entered on February 19, 1975. A Petition for Rehearing was timely filed on March 5, 1975 and denied on April 2, 1975. On April 10, 1975, Mr. Justice Brennan ordered that petitioner's time for filing a petition for a writ of certiorari be extended to and including June 1, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions and Statutes Involved

The Fifth Amendment of the Constitution of the United States provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . No person shall be held to answer for (an) . . . infamous crime unless on a presentment or indictment of a grand jury.

The Sixth Amendment of the Constitution of the United States provides:

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[1] References herein to "b" are to pages in the appendix attached to this petition. References to "a" pages are to pages in the printed appendix in the Court of Appeals.

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . ., to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him . . .

Section 1621 of Title 18 of the United States Code provides:

> § 1621. Perjury generally
>
> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, and that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury . . .

Section 1622 of the United States Code provides:

> § 1622. Subornation of perjury
>
> Whoever procures another to commit any perjury is guilty of subornation of perjury . . ."

Section 1623(a) of the United States Code provides:

> § 1623. False declarations before grand jury or court
>
> (a) Whoever under oath in any proceeding before a ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined . . . or imprisoned . . . or both.

Questions Presented

1. Did not the government violate petitioner's Fifth and Sixth Amendment rights when it presented in evidence against him the fact that his alleged co-conspirator had claimed his Fifth Amendment right not to testify concerning the very incident which formed the basis of the charges against petitioner?

2. Did not the courts below err in determining, on a question of first impression, that the amendment of Title 18 of the United States Code to create the crime of false declarations enlarged without congressional action the crime of subornation of perjury and abrogated the rule that subornation cannot be sustained on the unsupported testimony of the convicted perjurer?

3. Was not the cross-examination of petitioner concerning alleged technical violations of the Corrupt Practices Act (a crime not within the indictment) a violation of petitioner's rights both because it was in itself highly prejudicial evidence of a crime not charged and because it formed the basis of the prosecutor's misstatement that petitioner had admitted that he had violated the Act?

4. Was it not improper to permit extensive cross-examination of petitioner concerning his income tax returns for the five years preceding trial particularly when those returns were relevant to no issue in the case and were introduced in a manner calculated to show petitioner's comparative wealth and the political sources of his income?

5. Did not the trial court err when it refused to question the jurors on *voir dire* concerning the prejudicial effect of Watergate publicity and then permitted the

United States attorney to put before the jury allegations that the State of New Jersey had engaged in a "coverup" of the activities for which the petitioner was being tried?

6. Did not the government by using McCrane's Fifth Amendment plea, by substituting evidence of petitioner's political activities for evidence of the crimes charged in the indictment and by a continual effort to demean the defense and deny it access to exculpatory evidence, deny petitioner his constitutional right to a fair trial?

Statement

This petition raises the question of whether the use by the United States against petitioner in a criminal prosecution of the fact that an unindicted co-conspirator had claimed his Fifth Amendment right not to testify concerning the events which formed the basis of the charges against petitioner voilated the Fifth Amendment. Since that testimony was admitted on the basis of an amendment on the eve of trial, and was put into evidence through the reading of grand jury minutes of the co-conspirator's refusal to testify at the time when that co-conspirator was unavailable to petitioner as a witness, the petition likewise raises questions of petitioner's Sixth Amendment rights to adequate notice of the charges against him and confrontation of the witnesses against him. The question appears to be one of first impression not only in this court but in the entire federal system, there being no reported case discovered by counsel or the courts below in which evidence of a co-defendant's refusal to testify has been admitted against a defendant. And, to the degree that one co-conspirator's plea of privilege is the equivalent of every co-conspirator's plea, the result is directly forbidden by this Court's decision in *Grunewald* v. *United States.*

The petition puts in issue, in addition, the cross-examination of petitioner concerning alleged technical violations of the Corrupt Practices Act, a crime not within the indictment, and the fact that the prosecutor in his closing argument, transmuted petitioner's denial of any violation of the Act into an admission of violation. It raises the issue of the government's extensive cross-examination concerning petitioner's income tax returns for the five years preceding trial and an attempt to prove from these returns that much of petitioner's income resulted from his political connections, a matter which, if true, was as prejudicial as it was irrelevant. Again, the petition raises the refusal to *voir dire* prospective jurors concerning possible prejudice arising from the publicity given to the Watergate affair and the actions of the United States attorney in suggesting to the jury that there had been an attempted "cover-up" of the fund-raising activities which formed the basis for petitioner's indictment. Finally, the petition raises the question of whether all of these actions were not part of a concerted effort to deny petitioner a fair trial.[2]

The prosecution which led to this petition began when petitioner, Nelson G. Gross, was indicted on May 22, 1973 by a federal grand jury in the District of New Jersey on Five Counts. Counts one and two were for allegedly counseling an illegal deduction of a campaign contribution by the Triple S Blue Stamp Company, a subsidiary of the

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[2] The petition raises, in addition, the subsidiary, but important question of whether the amendment of Title 18 of the United States Code to create the crime of false declarations amended by implication the crime of subornation of perjury to include subornation of false declarations and abrogated the rule that a conviction for subornation of perjury cannot be sustained on the unsupported testimony of the convicted perjurer.

Grand Union Company. Counts three, four and five were for allegedly concealing that deduction from the grand jury and suborning the perjury of William Preis, a vice-president and Director of Grand Union, as well as President of Triple S.

William Preis, the chief government witness, accompanied by Leonard Wolfram, counsel to Grand Union and Triple S, had appeared before the grand jury and lied as to his company's 1969, $5,000. campaign contribution. Having been indicted for perjury before the grand jury, and pleaded guilty to that crime, Preis then testified at the trial herein that in 1969 Gross had told him to deduct the contribution as a business expense on Grand Union's 1969 income tax return, and that in 1973, Gross had advised him to lie to the grand jury. After a lengthy trial, the jury convicted petitioner on all five counts. Petitioner's post-trial motions were denied, and, on June 14, 1974, the trial court sentenced petitioner to a two year jail sentence and a fine of $10,000.

That judgment was appealed to the United States Court of Appeals for the Third Circuit which affirmed on February 19, 1975. Petitioner filed a timely petition for rehearing, raising the fact that his co-conspirator, Joseph McCrane, whose Fifth Amendment plea had been used in evidence against petitioner had been the beneficiary of a direct verdict of acquittal on the same conspiracy charge the day of oral argument in petitioner's case. The petition for rehearing pointed out that in the course of McCrane's two trials, extensive evidence which would have been exculpatory to Gross and was in the hands of the government had come to light. Petitioner also attached to his petition for rehearing an affidavit of Joseph McCrane which established, among other things, that McCrane had not claimed his Fifth Amendment rights as part of a conspiracy with

petitioner and that petitioner had not lied—as the United States attorney told the jury—when he testified that McCrane, and not petitioner, had sole responsibility for the fund raising activities in the Cahill campaign (44b). Moreover, McCrane's affidavit directly contradicted much of the testimony of William Preis against petitioner. The Court of Appeals, nevertheless, refused rehearing, although it noted that there were matters raised in the petition which could appropriately form the basis for a new petition for relief before the trial court (24b).

This petition for certiorari followed.

ARGUMENT

1. In an open disregard for the Fifth Amendment right against self-incrimination and the Sixth Amendment right to confrontation, the government introduced as evidence against petitioner Gross the fact that his alleged co-conspirator, Joseph McCrane, had claimed his Fifth Amendment right not to testify before the grand jury when questioned about the very transaction which formed the basis for the charges in this case.

A brief history is necessary here. Count I of the indictment charged that Gross, along with others involved in the William Cahill 1969 gubernatorial campaign (including McCrane) had conspired with each other and with William H. Preis, President of Stop and Save Trading Stamp Corporation, and with that corporation to defraud the United States by furnishing a false invoice to Preis and Stop and Save so that Stop and Save could treat a nondeductible campaign contribution as a deductible business expense. Count III of petitioner's indict-

ment charged a conspiracy between petitioner and Preis to frustrate the investigation of the conspiracy alleged in Count I. All of the overt acts charged in Count III of the indictment involved meetings between petitioner, Preis and a representative of the Grand Union Company, parent of Stop and Save. Five days before trial commenced, however, the government announced to Gross that it might add Joseph McCrane as a co-conspirator in Count III and, on the day the jury was sworn, after Gross' counsel demanded that the government choose its course of action, did so amend the indictment.

The reasons for this amendment became apparent only at trial: Preis, the chief prosecution witness, testified he had been called before the grand jury investigating Cahill campaign contributions and that he eventually proposed to petitioner that he admit to the jury that the invoice his company had paid actually represented a campaign contribution, but that petitioner urged him to continue to testify that the invoice represented legitimate business expenses. This Preis could do safely because there was no way he could be caught in this lie unless petitioner or McCrane were to testify against him "[a]nd I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing . . ." (2009a). The government then introduced, over petitioner's objection, testimony that McCrane did appear before the grand jury and, when questioned whether he had directed "anyone to issue false and fictitious invoices from Writers Associates to . . . the Stop and Save Company . . ." claimed his Fifth Amendment privilege (2862a).

Had there been no attempt to charge McCrane as a co-conspirator on Count III, the trial court would have recognized how collateral this evidence was to the Count III conspiracy as the indicting grand jury had charged it

and how prejudicial it was as the Fifth Amendment plea of petitioner's Count I co-conspirator on a question concerning the very basis of the Count I conspiracy. But, faced with an amended complaint which made McCrane's act the act of a co-conspirator in furtherance of the Count III conspiracy, the trial court was led to view the testimony as far more central to the case and to admit it improperly despite the vigorous objection of petitioner's counsel.

The Court of Appeals avoided this whole question by treating the evidence of McCrane's plea of privilege as mere corroborative evidence of Preis' testimony concerning Gross' alleged statement to him. But it is clear that the Fifth Amendment plea was viewed by both the prosecutor and the trial court as something more. To the prosecutor it was an act in furtherance of the Count III conspiracy (he had argued that proof of McCrane's plea ". . . goes to the very gut and the heart of the conspiracy . . . goes to show the cover-up . . ." 2760a); to the court it was, at the least, evidence of that conspiracy. Specifically, in its charge to the jury the court said (4879a):

> You will recall, ladies and gentlemen, that I have permitted the government to offer proof that Joseph McCrane was a co-conspirator in Count III as well as in Count I. In this regard, I permitted the government to introduce into evidence McCrane's Grand Jury testimony wherein the witness asserted his privilege aganst self-incrimination.

And, the court later charged concerning overt acts (whether or not those acts were charged in the indictment (4990a)) committed in furtherance of the conspiracy (4887a):

> An overt act means any act done to accomplish or effect the purpose or intent of the agreement or common understanding to defraud the United States or commit an offense against it. Such an act by any one of the parties to such an agreement of [sic] understanding is the act of all.

True, the court said that the McCrane grand jury testimony had been admitted for a limited purpose, should not be considered "as bearing on whether McCrane would have incriminated himself or the defendant by testifying before the Grand jury [sic]" and "has no bearing on Mr. Gross' culpability a to any of the crimes charged in this indictment." (4879a-80a). But intelligent jurors, having been informed by the court that the "corroborating" refusal of McCrane to testify before the grand jury was admitted into evidence in regard to the Count III conspiracy and that petitioner was responsible for the acts of his co-conspirators, could hardly have concluded merely, as they were permitted to do, that Preis testified truly when he said that petitioner had said he was aware of McCrane's intended plea, without concluding as well that petitioner was in fact responsible for that plea. Even the United States attorney, no mere layman, was unable to follow the court's instruction concerning the McCrane plea, and argued to the jury with respect to that plea that it might "find *as part of the conspiracy* or . . . to corroborate Mr. Preis' testimony, Joseph McCrane took the Fifth Amendment in the United States grand jury." (Emphasis supplied) (4802a).[3]

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[3] If the United States attorney understood the court's instructions that the testimony could only serve to corroborate Preis' testimony, then he intentionally violated those instructions and petitioner's constitutional rights in urging that the jury consider that testimony as part of the conspiracy.

Moreover, even assuming that the instructions of the trial court were sufficiently clear to inform the jury that they were to disregard the fact that McCrane's Fifth Amendment plea was that of an alleged co-conspirator of petitioner, the fact that the plea of privilege concerned the very substance of the Count I conspiracy even as it allegedly furthered the Count III conspiracy makes it difficult to believe that the jury could have disregarded the—to a layman—obvious implication of the co-conspirator's pleading "the Fifth" about the Writers Associates-Stop and Save transaction. Certainly the Court of Appeals could cite no authority whatever for the proposition that the limiting instructions actually given would be sufficient to cure such use of a co-conspirator's Fifth Amendment plea. And it totally disregarded the well-reasoned opinions of the Pennsylvania Supreme Court in *Commonwealth* v. *Terenda,* 451 Pa. 116 (1973), and *Commonwealth* v. *DuVal,* 453 Pa. 205 (1973), forbidding the prosecution to put a co-defendant's plea of privilege before the jury and holding that instructions cannot cure such an action, just as it disregarded the decision of the Court of Appeals in *SanFratello* v. *United States,* 340 F.2d 560 (5th Cir. 1965), that the government cannot constitutionally place before the jury defendant's wife's claim of the Fifth Amendment privilege, *Kinser* v. *Cooper,* 413 F.2d 730 (6th Cir. 1969), that comment on the failure of a co-defendant to testify at a joint trial implicated the defendant and was, therefore, constitutionally impermissible, and *Scott* v. *Perini,* 439 F.2d 1066 (6th Cir. 1971), to the same effect. And in the *San-Fratello* case, at least, the trial court had charged fully and firmly that the claim of privilege by the defendant's wife could be in no way used to incriminate any other defendant in the case (340 F.2d at 564-65), yet the Court of Appeals held that instruction no cure. When, as here,

there is no controlling opinion directly on point, the Court of Appeals certainly had a duty to distinguish such persuasive authority if it did not have to follow it.

Nor is the fact that the knowing introduction of the plea came as corroboration material. If Preis is to be believed, petitioner told him that he, as well as McCrane, would refuse to tell about the alleged false and fictitious invoice. Does this mean that the Fifth Amendment would not prevent the introduction of petitioner's own plea of privilege as corroboration at his trial? Certainly not. That is the clear holding of this Court in *Grunewald* v. *United States,* 353 U.S. 391, 421-24 (1957), where the Court also held that limiting instructions, functionally equivalent to those given in this case, could not cure the danger of the constitutional violation. *Id.* at 424. Yet a similar claim of privilege by a co-conspirator would, under the general law charged by the trial court in this very case, be as much petitioner's plea as if he had made it himself. Under these circumstances, this Court's holding in *Bruton* v. *United States,* 391 U.S. 123 (1968), that limiting instructions could not cure the introduction at the joint trial of two defendants of one defendant's confession which incriminated the other, should apply equally to the facts of this case.

Again, with respect to Count III the amendment of the indictment in this case violated petitioner's Sixth Amendment right to notice of the charges against him. The addition of McCrane as a co-conspirator was, on these facts, just such a change in the basic theory of the conspiratorial agreement—from one in which petitioner alone conspired with Preis and Grand Union employees to one in which petitioner joined another Cahill campaign official in conspiring with Preis and Grand Union employees—as had been held forbidden in, *e.g., United States* v.

DeCavalcante, 440 F.2d 1264 (3d Cir. 1971). Had Gross had notice that the indictment would be amended to include McCrane as a co-conspirator in Count III, he would at least have had the opportunity to prepare a defense that he had had no contact with McCrane from the time the grand jury investigation became known until long after the meeting at which Preis claims petitioner spoke for McCrane because McCrane was traveling out of the country during the entire period (44b).

And the addition of Joseph McCrane as a co-conspirator and the evidence of his plea of privilege were peculiarly damaging even apart from the prejudicial nature of the subject matter of his plea because the jury could well have inferred from the testimony, elements of the charge of the court and their own common sense that McCrane's refusal to testify was an act of furtherance of the conspiracy and could have based petitioner's conviction on Count III in whole or in part on the refusal of McCrane to testify. Yet the grand jury did not charge petitioner with conspiring with McCrane in Count III, and that count is plainly drawn in terms of a conspiracy solely among petitioner, Preis and other Grand Union employees.[4]

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[4] The grand jury which did not mention McCrane in the Count III conspiracy was well aware of McCrane's existence, having charged him as a co-conspirator in Count I. Indeed, since Count I charged a conspiracy involving actual fund raising activities, the grand jury could not have been unaware of the importance of McCrane since McCrane and not Gross was the Finance Chairman of the Cahill campaign and the grand jury indicted him on ten counts of unlawful fund raising compared to the single count involving Gross.

There is no evidence of the amended conspiracy beyond McCrane's assertion of his Fifth Amendment right.[5] (See 4879a) Thus, it is plain on the record that there was no justification for the inclusion of McCrane as a co-conspirator in Count III of the indictment beyond the attempt to make petitioner responsible for his plea of privilege and that that inclusion produced not merely a possibility but even a likelihood that petitioner was penalized because McCrane made a good faith assertion of his Fifth Amendment privilege. In other words, the amendment served *no* purpose but to prejudice petitioner by forming the basis for the introduction and misuse of constitutionally inadmissible testimony.[6]

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[5] Since the plea of privilege was the only link between McCrane and the activities at the time of the grand jury investigation, it is difficult to understand the finding of the Court of Appeals that McCrane "was inexorably intertwined . . . with the government's theory of the subornation charge." (12b).

[6] The argument in this part of the petition is based on the fact that the use of McCrane's plea of privilege was crucial to the conviction of Gross on the Count III conspiracy. Because of the charge of the court, it was equally crucial to the Count IV obstructing justice charge:

> "You will recall that William Preis testified that on April 12, 1973, Preis met with the defendant Gross and advised Gross that he was going to appear before the Grand Jury. Preis further testified that the defendant Gross counseled him to 'stick to his story' since besides Preis only Joseph McCrane and he, Gross, knew the real story, and McCrane would invoke the Fifth Amendment when called to testify. If you believe that testimony to be true, then the defendant is guilty of endeavoring to obstruct justice as charged in Count IV of the indictment."

(Footnote continued on following page)

Finally, the McCrane grand jury testimony was introduced in a manner calculated to destroy Gross' right under the Sixth Amendment to cross-examine the witnesses against him. McCrane was awaiting trial on related charges at the time Gross was tried and was unavailable to Gross as a witness. Yet his unexplained and unexamined testimony before the grand jury was used against Gross as much as if that testimony had been the subject of prior cross-examination by counsel for Gross. Moreover, it was introduced in the way best calculated to prejudice Gross. Gross' counsel, while preserving his objection to any use of the grand jury testimony whatever, agreed to stipulate that "McCrane was called pursuant to this investigation and he declined to testify." (2855a). Instead, the grand jury stenographer was called and permitted to read questions relating to both Stop and Save, the company involved in the present case, and numerous other companies with which McCrane may have been involved but Gross certainly was not. Thus, the denial of the right to confrontation and effective cross-examination magnified the incriminatory effect of this so-called corroborative evidence upon Gross.

In summary, then, by adding McCrane as a co-conspirator in the concealment charges on the eve of trial, the government was able to present testimony that McCrane

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(Footnote continued from preceding page)

(4868a). Moreover, the same testimony would then have supported the subornation charge, although the court did not highlight this fact. Finally, to the degree that the amendment permitted the introduction of testimony concerning McCrane's plea of privilege which the jury may well have taken as the equivalent of Gross' own plea with respect to the subject matter of Counts I and II, the late amendment prevented petitioner from preparing a defense against evidence damaging on those counts as well.

had asserted his Fifth Amendment rights before the grand jury which indicted both Gross and McCrane. McCrane's Fifth Amendment plea, in turn, provided the evidence that he and Gross were co-conspirators, making McCrane's assertion of the privilege the equivalent of a similar assertion of that privilege by Gross in front of the very jury that tried him. This violation of Gross' constitutional rights was too great to have been cured by limiting instructions, even if those instructions had been clear and forceful. What is more, because McCrane remained unavailable as a witness at Gross' trial on the advice of his attorneys pending his own trial (and subsequent acquittal) on the same charges, Gross was unable to confront McCrane and, indeed, to present him as a witness on his own behalf.

2. The amendment of Title 18 of the United States Code to create the crime of false declarations did not enlarge the scope of the crime of subornation of perjury or abrogate the rule that subornation of perjury cannot be sustained on the unsupported testimony of the witness whose testimony was allegedly suborned.

It has been decisively settled for generations that the testimony of one witness, without corroborating circumstances, does not suffice on the charge of perjury or its subornation. This was recognized in *Hammer* v. *United States*, 271 U.S. 620, 626 (1926), where this Court wrote that "[T]he general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury." Continuing, the Court held that "[T]he rule that the uncorroborated testimony of one witness is not enough to establish falsity applies in subornation as well as in perjury cases." (*Id.*

at 629). As noted by the Third Circuit in its opinion, *Weiler* v. *United States*, 323 U.S. 606, 610 (1945), reiterated the *Hammer* holding and reemphasized that "[T]he rule has long prevailed and no act in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice."

Although the Congress, when it adopted 18 U.S.C. § 1623, did not include a requirement of corroboration to support a conviction for false swearing, it did not amend the general perjury statute contained in 18 U.S.C. § 1621 or make any effort to remove the requirement of corroboration to support a conviction for perjury. Equally clearly, no amendment to the subornation statute (18 U.S.C. § 1622) accompanied the enactment of the false swearing statute.

Nevertheless, the trial court and the Court of Appeals have done what the Congress did not do—amend the subornation statute. The Court of Appeals, while recognizing that ". . . the perjury and false declaration statute are not equivalents . . .," held that the false declaration statute defines a species of perjury and that that species of perjury is included within the subornation statute. In so doing, the court below created a new crime subject to new proof without notice to petitioner or to others similarly situated. And it did so with an act of statutory construction directly contrary to that used by this Court in *Hammer* v. *United States*, which found the subornation statute *pari materia* with the general perjury statute.

Indeed, the Court of Appeals in its opinion (8b) recognized the basic differences between the new false swearing statute and the general perjury statute:

> Unlike the general perjury statute, Section 1623 requires that a false statement be made "knowingly" rather than "willfully."

The quantum of proof needed to prove knowledge is obviously less than that required to prove willfullness. Yet willfullness was a necessary ingredient of subornation as was corroboration. The Court of Appeals rejected petitioner's argument that the Congress having declined to amend the subornation statute (or the perjury statute), the courts should not undertake that task for the Congress, labelling the argument as "an unduly narrow interpretation of the subornation statute." (8b). But no citation is needed for the principle that criminal statutes must be narrowly construed, as this Court construed the very statute involved in this case when it decided *Hammer*.

Moreover, there is strong reason to hold that the decision of the Congress to create a false swearing statute which did not require corroboration was based on considerations which are not applicable to the crime of subnoration of perjury. It is one thing to hold that one honest witness may give testimony which can convince a jury beyond a reasonable doubt in a false swearing case as much as in a bank robbery or mail theft case. It is another thing to conclude that the word of an admitted perjurer should be enough to form, by itself, the basis for the conviction of another as the suborner of his admitted perjury. And if this was the reason that the Congress did not create the crime of subornation of false swearing or merely amend the general perjury statute along the lines of the false swearing statute—which might have had the same effect—then the Court of Appeals should not have taken it upon itself to redraft the statute for the Congress.

In any event, the construction of the subornation statute in the light of the false swearing statute is a question of great importance not heretofore considered or

settled by any other court of appeals which should be settled by this Court. The creation of what appears to be a new crime by judicial fiat leaves the law unclear to prosecutors and defendants alike and raises questions as to the continuing vitality of this Court's *Hammer* decision which only this Court can answer.

3. By introducing testimony of petitioner's use of campaign committees in his 1970 senatorial campaign, the government sought to prove that petitioner had violated the Corrupt Practices Act, a crime not within the indictment, in violation of petitioner's due process rights.

Although the charges against petitioner centered on a single campaign contribution of Stop and Save Corporation, the government in its cross-examination of Gross improperly sought to imply to the jury that Gross had been engaged in a pattern of criminality in his political life.

Specifically, the government cross-examined Gross at length concerning his sworn statement of receipts and expenditures filed as a 1970 candidate for the United States Senate. This statement was required by the Federal Corrupt Practices Act, 2 U.S.C. §241-56, now repealed and superseded by the disclosure provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. §431-54.

This cross-examination began with a perfectly appropriate inquiry,[7] and the Court of Appeals characterized

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[7] Petitioner does not protest the use of the affidavit on cross-examination concerning his familiarity with the Mailmar company. Petitioner had testified that he was unfamiliar with the company, and the government had every right to show that it was among those listed as having received payment for work done on the senatorial campaign.

what followed as "a few additional questions" beyond this appropriate inquiry. The record shows, however, that the appropriate inquiry involved only one of fourteen pages of transcript (4087a-101a) of cross-examination into the Corrupt Practices Act statement. Moreover, from this cross-examination, the United States attorney constructed an argument that Gross had violated the Corrupt Practices Act and that the jury could infer from "this violation" that Gross would equally have committed the violations charged in the indictment.

Some knowledge of the Corrupt Practices Act is required to understand just how misleading the United States attorney's examination was. 2 U.S.C. §248(b)(2) places an absolute limit of $25,000 on campaign expenditures for a candidate for the United States Senate. Since it is impossible for a candidate to operate within these limits, senatorial campaigns during the time the Act was in effect were universally financed by campaign committees, theoretically not a part of the candidate's own campaign. Petitioner admitted that just such a technique had been used on his behalf to avoid the strictures of the Act (as had his successful opponent and every other member of the United States Senate).

But the United States attorney was not even satisfied with this admission. When court resumed following this cross-examination, petitioner's counsel moved to strike the testimony and asked for an instruction to the jury that it was proper for a candidate to finance his campaign through separate committees (4105a-07a). The United States attorney then accused Gross of having violated the Act and characterized the motion to strike as an attempt to "legitimatize an illegal and improper act," (4107a) and objected to any such charge. Indeed, and when he came to refer to the campaign statement in his closing remarks, the United States attorney candidly

acknowledged that he had brought out this testimony in an attempt to establish petitioner's alleged wrongdoing and bad character (4826a):

> Why do we bring out the conflict—the Senatorial campaign statement? Because it is eloquent testimony to the way this defendant used the laws of the United States.

In other words, petitioner should be convicted of the crimes charged because he had shown a disregard for other federal statutes.

As indicated, petitioner's use of campaign committees did not show a disregard for the law but an acceptance of the universal fact that campaigns for the United States Senate cost more than $25,000 and, until Congress repealed the Corrupt Practices Act, had to be conducted through campaign committees. But even if the campaign affidavit had shown that petitioner had a disrespect for the law, that testimony should have been excluded precisely because of the prejudicial effect it might have. As this Court said in *Michelson* v. *United States,* 335 U.S. 469, 475-76 (1948) (footnotes omitted):

> Courts that follow the commonlaw tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even

> though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

In other words, precisely to the degree that the evidence that Gross' campaign was conducted by avoiding the Corrupt Practices Act showed bad character, that evidence was constitutionally inadmissible as unduly prejudicial.

Worst of all, the United States attorney was not satisfied with the damage he had done by this improper cross-examination. When he spoke of petitioner's testimony with reference to the Corrupt Practices Act, the attorney for the government told the jury that Gross had asserted that he had not violated the law but rather "I avoided it." (4828a). In fact, petitioner had not testified at all to his personal involvement in the decision to use campaign committees to avoid the Act. Petitioner was asked if the Act had been violated and he replied, "no, it was not violated. It was avoided." (4093a). Nor was it enough that petitioner was made personally responsible for the inevitable decision to avoid the Act. At the end of his summation, the United States attorney again referred to the repealed Corrupt Practices Act and, with a total indifference to petitioner's right to a fair trial on the charges in the indictment against him, and only those charges, completely distorted petitioner's testimony (4828a-29a):

> Nelson Gross, to sum it up in his own words, he avoids the law, he violates the law, he is guilty of the crime charged beyond a reasonable doubt.

The Court of Appeals found this statement "particularly troublesome". As the Court stated: "These remarks seem to us to go beyond merely attacking appellant's credibility through comment on how he viewed an oath and appear to constitute an argument that the appellant's alleged violation of the Corrupt Practices Act was a matter which the jury could consider in determining the guilt or innocence on the crimes charged." However, the Court did not reverse petitioner's conviction despite the fact that this most damaging statement came at the close of the United States attorney's argument, holding that the remarks did not constitute plain error and counsel for petitioner had not objected.

In other words, the Third Circuit recognized that the United States Attorney, in his closing, had twisted and misused the testimony he had obtained during the irrelevant examination into a series of statements of his own belief that petitioner had a total disregard for the law and, with as little justification, into an admission on petitioner's part that he had violated the law. Since these remarks represented the peroration of the United States attorney's closing statement, given as he folded his papers and ended his speech, an objection at that time, if made, could have been counted on to do nothing more than fix this dramatic closing in the eyes of the jury.[8]

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[8] Indeed, given the refusal of the trial court to strike the irrelevant cross-examinations (4105a-4109a), the denial of an offer into evidence of the United States Senate Report 9296 which described the weaknesses in the Corrupt Practices Act with re-

(Footnote continued on following page)

Thus, petitioner's trial was not confined to the charges in the indictment but was expanded to include what the prosecutor called violations of the ominously labeled Corrupt Practices Act and, in the end, an admission of guilt of those violations. When the prosecutor's acts are so plainly beyond those permitted by this court in the *Michelson* case and so plainly and overwhelmingly prejudicial to petitioner and other defendants similarly situated, the opinion of the court below constitutes a repudiation of the law of this Court and a proper subject for review by certiorari.

4. The extensive cross-examination of petitioner concerning his income tax returns for the five years preceding trial was highly prejudicial and relevant to no issue in the case.

Indeed, in answering Gross' argument that the returns should not have been introduced in evidence, the court of appeals did not hold that they were relevant but sustained the government position that since Gross had adduced testimony with respect to income concerning Government witnesses, notably that of the Grand Union Company and Eastland Woolen Mills, Inc., and their officers, the door to an inquiry as to petitioner's personal income had been opened. This contention ignored the fact that the income of those companies was relevant, since 26

(Footnote continued from preceding page)

spect to the need for campaign committees and called for its repeal (4368a-69a) and the refusal of petitioner's request for charge concerning the Corrupt Practices Act (4698a), an objection might well have been overruled. When the court did come to charge on the subject, its charge was, again, unclear and prejudicial to petitioner (4894a).

U.S.C. 7206 (2), under which Gross was charged, provides that the tax return, to impose criminal responsibility, must have been false "as to a material matter." Therefore, the amount of taxes paid by those companies as compared to the tax savings involved was a valid inquiry on the materiality of the deduction, as was the treatment of other business expenses, promotional and otherwise.

Further, since the question of tax deductibility on the part of Grand Union was a central issue, it would be perfectly proper to determine whether Preis and Wolfram (whose income was published in the annual report of the company) were knowledgeable as to the finances of their company, its operations, the manner in which expenses were or were not deducted, and their responsibility and position in the hierarchy of the Grand Union management. Also relevant was the income structure of that company together with the pattern established for the treatment of ordinary and necessary business and other expenses including those for campaign contributions. None of the examination with respect to those matters should have been considered as opening the door into the extensive inquiry relating to Gross' income and its sources when Gross was not charged with the substantive crime of tax evasion.

Nonetheless, the United States Attorney undertook a broad inquiry into petitioner's income, which lasted the better part of a day. (See 4117a-68a). Even earlier, he had referred to petitioner's residence, its extensive premises and his housekeeping and landscaping requirements (2977a). The culmination of the cross-examination was the actual introduction into the record of petitioner's personal income tax returns for the five-year period from 1968 to 1972 (G75-G80), and petitioner was forced to read to the jury his total income during those years. He testi-

fied, in answer to the United States Attorney's questions, that his income in 1971 (he was in his law office from January 1 to August 2 of that year when he left for Washington) was $225,280.00, on which he paid taxes of $126,333.00 (4151a-53a); and that his total income from all sources in 1972 was $158,235.00, including $121,200.00 from his law firm, on which he paid taxes of $62,174.00. All of this, including the introduction of the income tax returns was accomplished despite repeated objections by defense counsel (4138a; 4147a; 4387a-88a).

The examination of income generated by Gross' law firm was expanded into a detailed inquiry concerning petitioner's clients to determine whether they came to the firm as a result of petitioner's political activity. For example, the government attorney explored at length Gross' representation of the Bergen County Sewer Authority and the fees derived from it. He even asked, although the court did not require Gross to answer, whether a client who contributed to Gross' senatorial campaign in 1970 was a "generous recipient" of public contracts from the County of Bergen (4117a-20). All this was calculated to convey to the jury, the implication that Gross illicitly profited from his political activity and was designed to prejudice petitioner in the minds of the jury. Defense counsel objected (4127a) arguing that "[T]here is no issue here, there is no impropriety in earning large legal fees, even if one gets clients as a result of political activities." The Court, while indicating its agreement, permitted the prosecutor to continue.

The United States Attorney then asked whether petitioner's law practice had been enhanced while he was Republican State Chairman (4129-30). In arguing against an objection the prosecutor frankly stated that "[T]he relevancy, your Honor, is that Mr. Gross was using this

position to solicit clientele" (4133a-34a). At this point, there was detailed questioning as to petitioner's listing in Martindale & Hubbell with the inference that there was an impropriety in Gross' biography together with a listing of representative clients. Returning to the Sewer Authority in Bergen County (*e.g.*, 4147a), the prosecutor again insinuated impropriety by reason of Gross' firm being appointed as counsel. Despite continuous objections at that point, the trial court even allowed the United States Attorney to show what percentage of petitioner's income was derived from the firm's representation of the sewer authority, notwithstanding the government concession that (4139a):

> I am going to tie into the area into which his income is tied into. That is political appointments, being counsel to the various sewer authorities, to show exactly how by use and by dint of your political position, patronage, you got positions with the sewer authority and you earned so much.

The Court of Appeals provided an unacceptable rationalization for the government strategy by its footnote No. 11. It cited an admission by defense counsel that Gross had already testified to certain income, but did not mention that the testimony was over objection. It also cites words of caution to the jury by the trial court, but does not mention that cross-examination on the same subject was allowed to continue, and, indeed, did continue for twenty more pages. What the United States attorney sought to convey to the jury was the message that petitioner was a wealthy man, testimony calculated to prejudice the jury against him in the best of times and that he had acquired this wealth through his political activities, testimony calculated in the summer of 1974 to be absolutely devastating. Yet, neither petitioner's wealth nor

the source of his income was in any way material or relevant in this case.

Indeed, the Court of Appeals could not cite a single case which would permit the admission of this testimony, and a number of court of appeals opinions imply that its admission was constitutionally impermissible. See, *e.g.*, *Blumberg* v. *United States*, 222 F.2d 496 (5th Cir. 1955); *Hartman* v. *United States*, 215 F.2d 386 (8th Cir. 1954); *cf.*, *Courtney* v. *United States*, 390 F.2d 521 (9th Cir.), *cert. denied*, 393 U.S. 857 (1968). Thus, the Court of Appeals opinion, if permitted to stand, will establish the proposition that the wealth of a defendant may be admitted on the slightest pretext despite the vast prejudice that this evidence may give.

5. The refusal by the trial court to inquire of prospective jurors on voir dire whether they would be influenced by the publicity given to the Watergate affair, followed by references by the United States attorney to an alleged "cover-up" of the fund raising activities in the Cahill campaign, combined to deprive petitioner of a fair trial by an impartial jury.

Petitioner was not only a former politician, having held *inter alia*, the position of state Republican Chairman, but had also been a public officer at various county, state and federal levels, reaching the rank of Assistant Secretary of State and United States Ambassador in the Nixon Administration. The United States Attorney was quick to remind the jury of Gross' background, and persisted in asking petitioner about his role in support of Richard Nixon at the 1968 Republican National Convention (4005-08). The question was obviously intended to delineate a relationship between Gross and the Nixon Administration and to insinuate a sinistser common denominator.

Despite requests at the outset by the defense, including a formal request on *voir dire* submitted before trial (76a), the trial court refused to question prospective jurors as to whether they would be influenced by what they had heard or read concerning Watergate (52a-53a, 81a). During the *voir dire,* prospective juror Garcia volunteered after lengthy questioning concerning newspaper publicity that he would be prejudiced as a result of the publicity concerning Watergate and the trials of former Attorney General Mitchell and Treasury Secretary Stans then pending in the Southern District of New York (284a-90a). The defense then repeated its request for an inquiry of the panel with respect to whether Watergate would in any way influence or prejudice their thinking. Again, the request was denied.

In affirming the refusal to make inquiry of prospective jurors concerning Watergate, the Court of Appeals disregarded recent decisions in the Seventh Circuit which established that *voir dire* must be broad enough to permit the defense to exercise intelligently its peremptory challenges. See *United States* v. *Lewin,* 467 F.2d 1132 (7th Cir. 1972); *United States* v. *Dellinger,* 472 F.2d 340 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973). Indeed, the *Dellinger* court made it clear that the trial court must inquire specifically into areas in which the likelihood of prejudice looms great because jurors are not always alert to their own biases and this shortcoming must be affirmatively countered to ensure a defendant's right to a fair trial.

Just how important it was for Gross to be able to exercise his challenges intelligently to exclude jurors who had viewed the allegations against him as examples of "Watergate morality" became clear when, on cross examination, the United States attorney asked Gross when he had first

heard of the name Writers Associates, the alleged co-conspirator which had provided the invoice used by Preis to claim the deduction of Grand Union's political contribution for tax purposes. Gross responded that he had first heard the name in the winter of 1973 in newspaper articles referring to reports in the press concerning "warfare" between New Jersey Attorney General Kugler and the United States Attorney's Office. The United States Attorney followed with a statement that (4216a):

> Mr. Gross, refer to the fact that there was an alleged, cover-up by the State and it was brought to your attention by Detective Sergeant Challender, who came to our office to report that he had been taken off an investigation involving Writers Associates.

And later during an interchange between counsel, the United States Attorney said (*id*):

> I want to find out whether this individual knew at that time there had been a cover-up in the State and it had been brought to your [Gross'] attention.

After further argument between counsel in the jury's presence, the prosecutor asked (4218a):

> Mr. Gross, didn't you know at that time that there were allegations that the State had covered, by an investigation into the 1969 campaign, involving Writers Associates?

That question prompted further objection, and subsequently, the United States Attorney stated (still before the jury) (*id.*)

> He [Challender] was called off an investigation by the State and who came to our offices on March 19

> and reported to us he couldn't investigate a phone call to Writers Associates.

The government said in its brief before the Court of Appeals that "little need be said concerning the prosecutor's remarks complained of," but conceded that "they were perhaps better left unsaid." (Brief for Appellee, p. 50).

Obviously the foregoing statements by the United States Attorney were absolutely unsupported in the record, constituted gratuitous volunteering of his own knowledge and information outside the record and unrelated to the case, and were designed to cement the Gross conviction by prosecutorial "testimony" that there had been a cover-up. And no more inflammatory words than "cover-up" in that year of the Watergate cover-up, could have been chosen, and no greater basis for the need to examine the jurors on their Watergate prejudice can be imagined.[9] Faced with this overwhelming prejudice, petitioner's counsel moved in vain for mistrial (4219a).

Surely, under these circumstances, the petitioner's Sixth Amendment right was totally undermined by his inability to inquire as to Watergate influence during the *voir dire*.

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[9] Worst of all, as the report of New Jersey Attorney General Hyland to Governor Byrne on October 10, 1974: "Confidential Inquiry of Attorney General re: Detective James J. Challender," contained in the supplemental appendix below (14 Supp. a), established that, the suggestion that there had been some attempt by the state to cover-up the investigation into corruption in the Cahill campaign was completely unfounded. This, of course, was unknown to the defense at the time of trial, even if they had been permitted to explore the collateral issue of "cover-up" and if that exploration would not have merely exacerbated the prejudice to petitioner.

6. The government, by characterizing petitioner's testimony as lies and demeaning petitioner's defense and by denying petitioner access to exculpatory materials, compounded the harm it had done by using McCrane's Fifth Amendment plea against petitioner and by substituting evidence and argument of petitioner's political activities for evidence of the crime charged in the indictment.

The conduct of the government which forms the subject matter of points 1, 3, 4 and 5 of the argument in this petition represents part of pattern of conduct aimed at bringing about petitioner's conviction by means unrelated to the evidence in the case. Specifically, petitioner was charged with counseling one unlawful income tax deduction and participating in a conspiracy with others to counsel such deductions; three additional counts charged that he conspired to present false testimony to the grand jury concerning the first charges, that he suborned that false testimony and that, in so doing, he obstructed justice. Petitioner was not charged with violating the Corrupt Practices Act, with obtaining clients for his law firm by his political activities or with persuading the State of New Jersey to "cover up" the alleged wrongdoing in the Cahill campaign. Yet it was evidence purporting to show these latter "violations" that was introduced on the slimmest pretense of relevance. And these matters were only examples of the case which the prosecutor put before the jury.

Thus, for example, the United States Attorney in his closing labelled an important piece of petitioner's testimony "the most absured outrageous lie I have ever heard in this courtroom." (4825a). Petitioner had testified that he as state party chairman had been responsible for political activities in the campaign, McCrane as finance chair-

man had been responsible for the fund-raising activities and the two of them had contact only through Paul Sherwin, the Cahill campaign manager (3837a-47a, 3879a-83a). No evidence was introduced to contradict Gross' testimony, yet the United States Attorney felt free to label it the worst of the lies he had heard in the courtroom.[10] In so doing, the prosecutor made himself a witness against petitioner and labelled petitioner a liar all at the same time. This is clear prosecutorial misconduct even when the assertion is aimed at a mere witness rather than the defendant himself. See ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution and Defense Function, §5.8(b) and comment (4). It has been held grounds for a new trial on circumstances similar to those in the present case even by state courts. See *Commonwealth* v. *Potter,* 445 Pa. 284 (1971). A federal prosecutor should certainly be held to the same standards, and it is the function of this Court to define and enforce such standards.

If the federal prosecutor felt able to label petitioner a liar, he was quick to assert a special dignity of his own office. When defense counsel referred to the prosecutor's predecessor in office as "Mr. Stern himself, the U.S. attorney," he was admonished by the present United States Attorney in the presence of the jury: ". . . in due respect to this court, it is now Judge Herbert Stern . . . . I think in respect to the court and my colleague it should be refered to in that way. . . ." (1191a). And in cross-examining petitioner, he testified in response to criticism of possible leaks from his office: "You know as a matter of fact the excellent reputation of this office for the last

[10] In fact, when Joseph McCrane became available to take an affidavit on petitioner's behalf, he made it clear that petitioner's testimony was no "outrageous lie" but the absolute truth. (Petition for Rehearing, Appendix, p. 25) (44b).

four years under Judge Lacey, Judge Stern, that it has for the last four years investigated all sorts of criminal activities. You know our reputation for both integrity and not leaking stories, and it is known throughout the state, is it not?" (4208a).

Petitioner does not question the right and indeed the duty of the United States Attorney to prosecute with vigor. What he does have is a duty to follow this Court's classic admonition in *Berger* v. *United States,* 295 U.S. 78, 88 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

See, *e.g., United States* v. *Grunberger,* 431 F.2d 1062 (2d Cir. 1970); *United States* v. *Schartner,* 426 F.2d 470 (3d Cir. 1970). And this rule plainly forbids self-adulation of the prosecutor's office, false and demeaning characterization of the defendant as a liar and equally false and devastating characterization of that same defendant as an admitted violator of the law.

Nor did the United States Attorney confine his "foul blows" to the statements he made in the courtroom. Equally damaging was the obvious unwillingness to comply with this Court's requirement in *Brady* v. *Maryland,* 373 U.S. 83 (1963), that a prosecutor disclose to defense counsel upon demand any exculpatory evidence in his possession.

Just how much evidence which would have exculpated petitioner was available to the government only became known to petitioner because of the happy fortuity that his alleged co-conspirator was subject to two trials after petitioner had been convicted. At the first of those trials, the government produced some limited material which was exculpatory of petitioner or indicative of prosecutorial misconduct at petitioner's trial. Thus, for example, Richard H. Smith of Writers Associates (whom the government immunized for the trial of McCrane but not for the trial of petitioner) testified that the legend on a Writers Associates invoice initialed by Preis had not been authorized or placed on the invoice by anyone from Writers. (McCrane T. 403-16). Again, he testified that he had discussed with McCrane the fact that certain contributors would want an anonymity (*id.,* 526-27) but that he never discussed tax deductions with McCrane (*id.,* 565-67). Each of these matters was of great importance, since the government at petitioner's trial had belittled petitioner's argument that the use of an invoice from Writers was to preserve Preis' company's anonymity.

Only the second McCrane trial, however, revealed how thoroughly the government had concealed exculpatory evidence. For at that trial it produced a statement of Smith given to IRS investigators on January 1, 1973 (Petition for Rehearing, Appendix, pp. 27-28) which specifically lists Stop 'n Save Stamps $5,000.00 contribution as one

given "from individuals who wished to keep their Identities Unknown." Equally, defendant's Exhibit 5 at the second McCrane trial was the letter concerning the Garden State Directory reproduced at 6a in the supplemental appendix in the Court of Appeals; it and a letter from the McCrane trial (Petition for Rehearing, Appendix, p. 29) establish that the Garden State Directory was an easily available avenue for tax deductible contributions to the Cahill campaign. Thus, it is clear that the government knew that Writers Associates was, as petitioner asserted, used as a vehicle for anonymity.[11] Nor is it credible that the government did not likewise possess evidence that the Garden State Directory was used as the vehicle for tax deductible contributions. Finally, government Exhibit 56 at the second McCrane trial, reveals that Trap Rock Industries had an unused investment credit which would have wiped out any additional tax that would have resulted if Trap Rock had not deducted its $15,000 contribution to the Cahill campaign. See the cross-examination of Special Agent John A. DiBellas (McCrane T. 100-01 (12/5/74)). Thus, the government had in its possession and did not turn over to petitioner, evidence that David Mendelson lied when he testified against petitioner

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[11] Indeed, Smith testified at the second McCrane trial that he had expressed worries to McCrane during the campaign that Writers Associates was being used as a source of tax deductions for contributors and had been told specifically that Writers Associates was being used to preserve confidentiality whereas the Garden State Directory provided tax deductibility. McCrane T. 91-93 (12/3/74). Smith also testified that he had readily permitted the IRS to review the Writers Associates books concerning the period of the Cahill campaign since the use of the company had not been for tax evasion. *Id.* 170-75. This information was plainly known to and concealed by the government at petitioner's trial.

that Trap Rock saved $7,500 by contributing to the Cahill campaign through Writers Associates, and the United States Attorney repeated and embellished that lie when he told the jury that Trap Rock's contribution "cost you and me and the citizens of this country $7,500." (4746a).[12]

Thus, in both its presentation of evidence and argument at trial and its failure to reveal exculpatory evidence known to it at the time of that trial despite petitioner's request for that evidence, the government showed a passion for conviction totally out of proportion to its passion for justice. That is a balance which only this Court can redress.

CONCLUSION

For the reasons hereinbefore set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 1, 1975.

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[12] The second McCrane trial also produced evidence that Gross testified truthfully when he said that he had had no contact with McCrane during the Cahill campaign and had had nothing to do with fund raising in that campaign. Specifically, Sue Miller testified at that trial that when Writers Associates got in touch with campaign headquarters in Newark she spoke with Chuck Bentz or with secretaries in the office, without any mention of petitioner, reconfirming the distance between the fund-raising and the vote-raising sides of the Cahill campaign and was, presumably available to the government which had granted her immunity.

APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA

v.

NELSON G. GROSS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Crim. No. 324-73)

Argued December 10, 1974

Before: ALDISERT, ADAMS and HUNTER, *Circuit Judges.*

Opinion of the United States Court of Appeals for the Third Circuit

OPINION OF THE COURT

(Filed—February 19, 1975)

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ALDISERT, *Circuit Judge.*

Nelson G. Gross appeals from a final judgment of sentence following a jury verdict on a five-count indictment charging aiding and assisting the filing of a false and fraudulent tax return, obstruction of justice, subornation of perjury before a grand jury and two counts of conspiracy. 26 U.S.C. § 7206(2) and 18 U.S.C. §§ 1503, 1622, 371. Although appellant has presented thirteen issues for review, only certain merit discussion.

I.

Testimony was adduced at trial which, when taken in the light most favorable to the verdict winner, indicates

the following: In July, 1969, Gross had a number of discussions with William Preis, president of Stop & Save Trading Stamp Corporation, pertaining to a possible $25,000 company contribution to William Cahill's gubernatorial campaign. When Preis stated that the company could not pay that much in cash, Gross proposed an "easy solution". Gross stated that if Preis agreed to make a $5,000 contribution by check, Gross would arrange to furnish Stop & Save with a bill for services rendered. Gross told Preis that "since it would be passed through as an operating expense it would become tax deductible, and it would actually only cost you half as much". (T. 1911-12). Gross assured Preis that, if the transaction were discovered, the worst that would happen would be a disallowance of the deduction by the Internal Revenue Service. In September, 1969, pursuant to this arrangement, Preis disguised a $5,000 contribution to Cahill's campaign as a business expense, utilizing a fictitious invoice from Writers Associates.

In the winter of 1972-73, the United States Attorney's office began investigating political activities in Bergen County, New Jersey. A federal grand jury issued a subpoena to Stop & Save in March, 1973, requiring the corporation to produce all records relating to Writers Associates. Thereafter, Preis met with Gross and, displaying the invoice and the grand jury's subpoena, asked, "Where do we go from here?" (T. 1993). Gross responded that the invoice represented payment for services rendered relating to a certain demonstration against an anti-trading stamp bill which had been pending in the New Jersey Legislature. Preis then asked Gross, "Why don't I just plain tell them the facts as they are, that it was a plain con-

tribution?" (T. 1999). Gross replied, "You can't, because if you do at this late stage of the game, you will immediately be cited for conspiracy and for fraud." (*Ibid.*). Preis, accompanied by corporate counsel Leonard Wolfram, met with the United States Attorney and one of his assistants on April 12, 1973. When shown the invoice and asked what services had been rendered, Preis responded with the contrived story about the demonstration. The government prosecutors informed Preis that they did not believe him and invited him to "rethink the whole story, . . . get . . . good outside criminal counsel, . . . prepare to come back . . . and . . . appear before the Grand Jury . . . [and] be very careful to tell the truth . . . ." (T. 2001). Later that day Preis met Gross and recited the events that took place in the United States Attorney's office. In response to Preis' need for outside criminal counsel Gross said, "You don't have any need for outside criminal counsel because I am it . . . . Perjury is one of the hardest criminal cases there is to prosecute and to prove, because . . . one of the ingredients and requirements of a perjury charge is to have someone get up and face you, challenge you, and claim that your statement was an out and out lie, and there is just nobody who can do that . . . . The only ones that really know the story behind this is [sic] myself and Joe McCrane. And I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing, and certainly I'm not going to tell . . . . [S]o you have nothing to worry about for perjury. . . . They have no evidence of any kind. You have nothing to worry about. You can go right back and tell that same story, and you will get off absolutely free." (T. 2008-09).

On April 17, Preis appeared before the grand jury and testified that a Stop and Save check in payment of the Writers Associates' invoice represented payment to a group of women who demonstrated at the State Capitol in Trenton, New Jersey. Preis was later indicted for makfalse declarations before the grand jury, 18 U.S.C. § 1623.[1] On advice of new counsel, he pleaded guilty to the indictment, and received permission to go back to the grand jury and tell the truth about his and Gross' participation in the Cahill campaign. (T. 2021-31). The indictment against Gross followed.

II.

Count V of the inditement charged Gross with "suborn[ing] . . . Preis to commit perjury, as that crime is defined in Section 1623 of Title 18," in violation of 18 U.S.C. § 1622.[2] Appellant attacks his conviction on this count on alternative grounds. He contends that Count V

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[1] *False declarations before grand jury or court*

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[2] *Subornation of perjury*

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

of the indictment must be dismissed because Congress has not made subornation to make a false declaration a crime. Alternatively, appellant takes the position that, if such subornation is a crime, the court erred in refusing to charge the time-honored "two-witness rule."

We begin our analysis with the recognition that there are distinctions between the crime of general federal perjury, 18 U.S.C. § 1621,[3] and the recently-created crime, "False declarations before grand jury or court", 18 U.S.C. § 1623.

One difference concerns "[t]he general rule in prosecutions for perjury [under § 1621] . . . that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury." *Hammer* v. *United States,* 271 U.S. 620, 626 (1926). *Weiler* v. *United States,* 323 U.S. 606, 610 (1945), reiterated the *Hammer* holding and reemphasized: "The rule has long prevailed, and no enact-

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[3] *Perjury generally*

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

ment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice."[4]

Legislation did come forward, however, in the Organized Crime Control Act of 1970, of which 18 U.S.C. § 1623 is a part, Title IV, Section 401(a), October 15, 1970, 84 Stat. 932. The Act makes it a crime for one to knowingly make "any false material declaration" before any court or grand jury of the United States. Section 1623(e) specifically provides: "Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

The legislative history discloses: "This Title [Title IV, FALSE DECLARATIONS] is intended to facilitate Federal perjury prosecutions and establishes a new false declaration provision applicable in Federal grand jury and court proceedings. It abandons the so-called two-witness and direct evidence rule in such prosecutions and authorizes a conviction based on irreconcilably inconsistent declarations under oath. . . ." 1970 U.S. Code Cong. & Ad. News 4007, 4008.

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[4] It is clear from both *Hammer* and *Weiler* that the Supreme Court does not consider the evidentiary rule to be of constitutional dimension; the Court merely refused to depart from "[t]he special rule which . . . is deeply rooted in the past centuries" in the "absence of . . . legislation." *Weiler* v. *United States, supra,* 323 U.S. at 608-10.

Abolition of the "two-witness rule" for prosecutions under § 1623 is not the only distinction between the two statutes. As we noted in *United States* v. *Lardieri*, 497 F.2d 317, 320 (3d Cir. 1974), *rev'd in part on other grounds on rehearing before original panel*, — F.2d — (3d Cir. No. 73-1750, December 18, 1974), Congress chose to provide different *mens rea* elements: "Unlike the general perjury statute, § 1623 requires that a false statement be made 'knowingly,' rather than 'willfully.'" Also, in § 1623 Congress expressly limited the tribunals before which the oath is taken.

Realizing that the general perjury and false declaration statutes have certain differences, appellant would have us hold that, without perjury as defined in § 1621, there can be no subornation of "such jury" under § 1622. Brief at 30. We reject this unduly narrow interpretation of the subornation statute.

Section 1622 provides: "Whoever procures another to commit any perjury is guilty of subornation of perjury. . . ." The express language of this statute embraces the procuring of another to commit "any perjury," not just "such perjury as defined in § 1621." While it is clear that the perjury and false declaration statutes are not equivalents, it is equally clear that § 1623 is a species of perjury.[5] Indeed, as previously rehearsed, the intent of § 1623

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[5] Congress neither amended § 1622 nor enacted a new subornation statute expressly proscribing subornation to make a false declaration when it enacted § 1623 in 1970.

was to "facilitate Federal *perjury* prosecutions." 1970 U.S. Code Cong. & Ad. News, *supra*, at 4008. Therefore, we hold that the words "any perjury" in § 1622 include the making of any false declaration under § 1623.[6]

Having disposed of appellant's statutory crime argument, we turn to his "two-witness rule"[7] contention. Appellant concedes, as he must, that Congress eliminated the

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[6] The government believes that *Hammer* v. *United States, supra,* lays appellant's argument to rest. We disagree. *Hammer* held that the general federal perjury statute applies to federal bankruptcy proceedings. *Bronston* v. *United States,* 409 U.S. 352, 357 (1973). Unlike the case *sub judice,* the *Hammer* indictment did not specify whether the subornation charge was drawn under 29(b) of the Bankruptcy Act [now 18 U.S.C. § 152] or § 125 of the Criminal Code [now 18 U.S.C. § 1621]. However, the Court found the allegations of the indictment were sufficient to charge an offense under *either* the perjury statute or the Bankruptcy Act. Accordingly, the omission in the indictment was immaterial; the defendant was charged with "subornation of perjury." 271 U.S. at 625. Thus, the Court in *Hammer* had no occasion to, and did not, meet the precise issue before us.

[7] Wigmore traces the ancestry of the two-witness requirement to the "Romanesque law of Continental Europe." 7 J. Wigmore, EVIDENCE § 2032, at 241 (3d ed. 1940). "By the end of the 1600s it was decisively settled . . . that the ecclesiastical rules about numbers of witnesses were not to be adopted into the common law. It was after that time that there arose the single common-law exception to the doctrine that one witness alone may suffice in every case, namely, the rule that *one witness, without corroborating circumstances, does not suffice* on the charge of perjury. Yet even this rule was an indirect borrowing from the civil law." *Ibid.* § 2040, at 273.

two witness requirement for prosecutions under the false declaration statute, § 1623. However, he somehow believes that the crime of subornation of a false declaration, in violation of 18 U.S.C. § 1622, requires corroboration.

Had appellant been indicted for subornation to commit perjury under the general perjury statute, § 1621, his argument would have had force. An essential element of this crime is proof that perjury was committed; and "[t]he general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the *falsity* of the testimony of the accused set forth in the indictment as perjury." *Hammer* v. *United States, supra,* 271 U.S. at 626 (emphasis added). "To hold to the [two-witness] rule in perjury and to deny its application in subornation cases would lead to unreasonable results." *Ibid.* at 628. Thus, *Hammer* held that the same rule of evidence must apply to both crimes—perjury and subornation of perjury.

But that is not this case. Here appellant was indicted for suborning Preis to make a false declaration before a grand jury. Section 1623 expressly abrogates the traditional "two-witness" rule.[8] To deny this rule's application in § 1623 prosecutions and to require its application in false declaration, subornation prosecutions would un-

[8] Congressional action in 1970 may be contrasted with the action of the 1911 joint Parliamentary Committee in England. Looking to a codification of English criminal law, the English Committee recommended, and Parliament passed, the Perjury Act of 1911, prohibiting convictions "solely upon the evidence of one witness as to the falsity. . . ." *Weiler* v. *United States, supra,* 323 at 610 n.4.

deniably lead to unreasonable results. Using the words of the Court in *Hammer*: "Obviously the same rule of evidence in respect to establishing the falsity of the matter alleged as [a false declaration] must apply to both." 271 U.S. at 628.

III.

The grand jury did not name Anthony Statile as a co-conspirator in Count I, nor did it name either Statile or Joseph McCrane as a co-conspirator in Count III. It did name McCrane as an unindicted co-conspirator in Count I. Both counts did recite that appellant and the named co-conspirators had conspired with each other "and with others."

On February 5, 1974, the government informed appellant by letter that it might offer proof that Statile was a Counts I and III co-conspirator. A letter dated February 21 notified appellant that McCrane similarly might be linked as a co-conspirator under Count III.

Selection of the jury commenced on February 26. Two and one-half days later, immediately after completion of the selection, appellant moved to require the government to disclose if in fact it was going to name Statile and McCrane as co-conspirators. After receiving an affirmative oral response from the government, appellant argued that (1) the addition of the names constituted a fatally improper amendment to the indictment and that (2) he was not accorded sufficient time to prepare his defense The district court rejected these arguments. Appellant reasserts them before us.

We do not write on a clear slate on the issue of amendment or variance of an indictment. *United States* v. *Radowitz*, — F.2d — (3d Cir., No. 74-1235, December 18, 1974); *United States* v. *Goldstein*, 502 F.2d 526 (3d Cir. 1974) (in banc); *United States* v. *Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (U.S. Oct. 9, 1974); *United States* v. *De Cavalcante*, 440 F.2d 1264 (3d Cir. 1971). We have previously reviewed the various functions of an indictment, *United States* v. *Goldstein, supra*, and have held that the precise inquiry is whether the change in the indictment is substantial or material, and not merely one of form. *Ibid.* at 528. We conclude that the addition of Statile and McCrane "did not so change the basic theory of the alleged conspiratorial agreement as to constitute an amendment to the indictment." *United States* v. *De Cavalcante, supra*, 440 F.2d at 1272 (footnote omitted).

Appellant's claim of insufficient time to prepare his defense must be tested in terms of actual or potential prejudice.

We now dispose of the contention relating to the addition of McCrane's name. He was inexorably intertwined with the specific allegations of the Count I conspiracy and with the government's theory of the subornation charge.

Specifically, appellant asserts that the addition of McCrane as a Count III co-conspirator enabled the government to get into evidence the fact that McCrane had exercised his Fifth Amendment right before the grand jury. The court, in the proper exercise of its discretion, admitted the evidence, with the appropriate cautionary in-

structions, for the specific and limited purpose of corroborating Preis' unobjected to testimony that Gross had said: "And I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing. . . ." (T. 2009, 2632, 2779-81, 2863-64). Because the court did not admit this evidence under the co-conspirator's exception to the hearsay rule, we fail to see how this prejudiced appellant.[9]

Without alleging any specific prejudice from the addition of Statile, appellant contends that he was somehow hamstrung in preparing his case for trial. Statile succeeded Gross as Republican Chairman of Bergen County. Jack Slavitt, a Newark lawyer, was solicited in 1970, along with others, to pay outstanding bills of appellant's campaign. He agreed to make a contribution in the amount of $1,000. Subsequently, he received a Mailmar invoice in the amount of $1,015. Mailmar was a printing company. Accompanying the invoice was a letter from Statile requesting Slavitt to send his check, which was made payable to Mailmar, directly to him at "GOP headquarters." (T. 1027). It is in the Slavitt situation that Statile's participation really surfaces. The government offered this

[9] We also do not believe that the court abused its discretion when it permitted the government to read into evidence the excerpt of the grand jury transcript showing that McCrane pleaded the Fifth Amendment when asked about his possible role in the issuance of "false and fictitious invoices". Because of the brevity of the excerpt introduced, because the question complained of merely provided the context in which McCrane pleaded the Fifth, and because the question made no reference to Gross himself, we do not believe that the reading of the excerpt was "inflammatory" or "prejudicial".

testimony to connect co-conspirators, Statile and Gross, with the use of Mailmar to mask political contributions.

We have some difficulty in perceiving the exact thrust of appellant's argument. We do not believe that he has demonstrated, by brief or at oral argument, how the addition of Statile as a co-conspirator altered the reception of this or other evidence referring to Statile's participation.

Appellant received informal notice of the possible addition of Statile three weeks before trial. No motion was made by appellant before the jury was selected to determine whether the government definitely intended to add Statile. After it was determined that Statile was to be added, appellant made no motion for a continuance. *See United States* v. *Somers, supra,* 496 F.2d at 746. Slavitt's testimony describing Statile's participation was completed on March 4; appellant did not open his defense until ten days later. *Cf. ibid.*

We conclude, therefore, that appellant did have time to react to Statile's addition and that the preparation of his defense was not adversely affected thereby.

IV.

Appellant argues that the trial court abused its discretion in permitting him to be cross-examined as to his income and as to certain financial statements he had filed. We find no abuse. The government's case was built largely on the testimony of Preis, President of Stop & Save, corporate counsel Leonard Wolfram and the wealthy in-

dustrialist Bernard Striar.[10] It was one of the pillars of the Gross defense, from the opening statement to the summation, that Gross was an insignificant person, and that these powerful men could not have been influenced by him. Thus, in the opening statement of the defense, the jury was told:

> The Gross firm was only little counsel. Nelson Gross was not a mastermind here. He was a private in William Preis' army.
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> • • •
>
> He [Gross] was only one in the Preis army of trying to convince legislators that it really isn't a good thing for the State of New Jersey to pass legislation which will seriously affect trading stamps.

(T. 748, 752-53).

In the government's case, Preis and Wolfram were cross-examined by Gross' counsel about their salaries, deferred income, life insurance benefits, executive incentive bonuses and stock option plans. By cross-examination, appellant developed that Grand Union, the parent company of Stop & Save, had a net worth of millions and annual sales of more than a billion dollars. Striar was also cross-examined about his finances and his company's profits.

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[10] Striar testified that during a July, 1970, meeting with Slavitt and appellant, he decided to make a $2,000 contribution to appellant's 1970 senatorial campaign. He and appellant discussed the possibility of masking it as a business expense. Gross then said, "[T]his could be taken care of by Mailmar." (T. 793). Shortly after this meeting Striar's New York office received a Mailmar invoice in the amount of $2,000, which was duly paid but not charged to Striar's personal account.

During the summation of the defense, the jury was told:

> I say to you that William Preis, the Number 3 man in this million dollar corporate complex of Grand Union, the man who by his own testimony built this Triple S blue stamp operation up from nothing in 25 years to where it is today, is the man who by his own testimony was the general in the operation to combat and stamp out legislation wherever it might crop up that would vitally affect his business.
>
> • • •
>
> It defies common sense, and it's an insult to your intelligence for him to say to you that in this one sphere he deferred to Nelson Gross who concocted the idea in 1969 of a phony campaign contribution and in 1973 directed him and counseled him to lie to Mr. Goldstein and the Grand Jury.

(T. 4532-33).

It is the government's position, and we agree with it, that once the juxtaposition of financial net worths was introduced in the case, it was proper for the government to elicit testimony from Gross seeking to demonstrate that he was not so financially insignificant as he purported to be. (*See* T. 4126-28).

Upholding comparable trial strategies, this court, in *United States* v. *Lowe,* 234 F.2d 919, 922 (3d Cir.), *cert. denied,* 352 U.S. 838 (1956) (footnote omitted), speaking through Judge Goodrich, added an appropriate literary

touch: "When a party opens up a subject, even though it may not be strictly relevant to the case, he cannot complain on appeal if the other side gives him a Rowland for his Oliver." [11]

Tangential to this issue is appellant's contention that it was plain error for the court to permit the government to cross-examine him concerning his sworn statement of receipts and expenditures filed as a 1970 candidate for the United States Senate. This statement was required by the Federal Corrupt Practices Act, 2 U.S.C. § 241 *et seq.*[12] Gross argues that an issue of possible violation of this act was placed before the jury on cross-examination, albeit without a timely objection being raised. The government justifies its use as a means to impeach appellant's credibility.

Gross testified on direct that he had never heard of the Mailmar Printing Company through the time of the November, 1970 election. In the Corrupt Practices Act statement, Mailmar was listed as one of the firms for which he, in October, 1970, expended funds for his campaign. This

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[11] The government later represented that it was using appellant's 1968-72 income tax returns to tie appellant's income, largely derived from his firm's representation of sewerage authorities, with his political position. (T. 4139). Appellant's counsel objected to such use but frankly admitted that Gross had already so testified. (*Ibid.*). Indeed, the court cautioned the jury that "[t]here is no impropriety involved." (T. 4148). In light of these facts, we find no abuse here.

[12] Repealed and superseded by Federal Election Campaigns Act, 2 U.S.C. § 431 *et seq.* Act of Feb. 7, 1972, Pub. L. 92-225.

was fair game for the jury on the issue of credibility.[13] Indeed, had there been a timely objection to this particular use of the statement, we believe that the court would have properly exercised its discretion if it had admitted it. As to this issue the probative value of the testimony outweighed any accompanying prejudice.

We are less certain of the purpose and propriety of using the statement as a foundation for the questions concerning the amount of monies received during the campaign from various sources, the number of additional campaign accounts that Gross had, and Gross' knowledge of expenditures by the various campaign accounts in his behalf. These questions surrounded the Mailmar inquiry. Because we are of the view that the use of the statement as to Mailmar would have been a proper exercise of discretion, we do not believe that these few additional questions, in the absence of a timely objection, were so prejudicial as to require a new trial.

Appellant argues that the Assistant United States Attorney went far beyond the bounds of permissible closing argument and disclosed the real purpose of admitting the sworn statement—that appellant violated the Federal Corrupt Practices Act. The prosecutor said:

> Why do we bring out the conflict—the senatorial campaign statement? Because it is eloquent testi-

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[13] The government also argues that it utilized the statement to refute the Gross-created impression that he was naive when it came to campaign financing. We have reviewed the record in this light and do not believe that the statement was used for this purpose.

> mony to the way this defendant views the laws of the United States.

(T. 4826). Immediately following this question and representation, the prosecutor went on to say:

> It is eloquent testimony to what he considers on oath to be, and the oath I'm going to read you concerns just the expenditures because that really is the important part of this document.
>
> * * *
>
> The important part of this document that was sworn to, signed and subscribed to, read, as he himself told you, and read carefully, was, Number 1, Mailmar. He denied ever knowing Mailmar.

(T. 4826-27).

Referring to an unreported campaign contribution by appellant's law partnership, the Assistant United States Attorney added:

> That was a direct contribution that had to be reported under the laws of the United States, even then.

(T. 4827). Shortly afterward, in referring to appellant's statement on cross-examination that he had "avoided" the Corrupt Practices Act, the Assistant United States Attorney concluded:

> Nelson Gross, to sum it up in his own words, avoids the law, he violates the law, he is guilty of the crime charged beyond any reasonable doubt in this case.

(T. 4828-29).

These remarks seem to us to go beyond merely attacking appellant's credibility through comment on how he viewed an oath, and appear to constitute an argument that appellant's alleged violation of the Corrupt Practices Act was a matter which the jury could consider in determining the guilt or innocence on the crimes charged. The last statement quoted above is particularly troublesome, because it seems to twist Gross' statement that he "avoided" the Act into an admission that he had violated it,[14] and to make further implication that he is therefore guilty of the crime charged.

Defense counsel failed to object at the time these statements were made; consequently, we can reverse only if the statements constituted plain error. *United States* v. *Somers, supra,* 496 F.2d at 742. We have concluded that they did not constitute plain error. Nevertheless, we unhesitatingly reaffirm Judge Garth's recent admonitions in *United States* v. *Somers, supra.*

V.

The remaining contentions raised by appellant may be discussed more briefly. We find no error in the trial judge's charge that Grand Union Company had made no

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[14] When Gross was asked whether the Act was "violated", he specifically denied that it had been and stated instead that it was "avoided". (T. 4093). Gross testified and his counsel argued that it was not a violation of the Act to fail to report contributions filed by local committees operating solely within one state (T. 4091, 4105-06), and the trial judge so charged the jury. (T. 4894).

attempt to deceive the IRS concerning other campaign contributions. It is apparent from the context of that portion of the charge that the trial judge was referring to attempts to deceive the Internal Revenue Service by the use of a false invoice, and there was, in fact, no evidence that false invoices were employed to disguise those other contributions. Furthermore, we agree with the government that Preis' possible role in deducting the other contributions was not really relevant, since it was clear that Preis used someone from outside Grand Union to obtain a Writers Associates invoice to make possible the deduction of the $5,000 contribution at issue. The only real dispute at trial was whether that outside person was Gross or someone else.

Little more need be added. We reject appellant's contention that his conviction must be set aside because of the prosecution's alleged knowing reliance on perjured testimony. Appellant's characterization of Wolfram's testimony as "perjured" is nothing more than a characterization, and there is no evidence to show that the government knew that Wolfram's testimony was inaccurate or "substantially misleading". *Cf. United States* v. *Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974). As to further allegations of prosecutorial misconduct, we accept the exhaustive analysis of Judge Whipple in his opinion denying a new trial. 375 F. Supp. 971 (D. N.J. 1974). We have reviewed the testimony and are satisfied that there was sufficient evidence to support the convictions.[15] We have

[15] Appellant's numerous contentions challenging the sufficiency of the evidence relate merely to the credibility of Preis and Wolfram, which we cannot evaluate for ourselves on appeal. Where the jury has returned a verdict of guilty, an appellate court is bound to accept the evidence in the light most favorable to the prosecution. *See United States* v. *De Cavalcante, supra.*

considered the other contentions raised by appellant and find them devoid of merit.[16]

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[16] Other contentions are: the admission of co-conspiratorial hearsay was in error and the charge to the jury compounded the error; the court's lack of an evenhanded policy during discovery violated substantial and constitutional rights of the defendant; the defendant was deprived of his constitutional right to a fair and impartial jury; the indictment should have been dismissed on the ground of selecitve prosecution and discovery should have been permitted with respect thereto; direct political contributions are deductible for tax purposes as ordinary and necessary business expenses, and therefore the indictment should have been dismissed or at least discovery permitted with respect thereto.

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA

vs.

NELSON G. GROSS,

Appellant.

(D.C. Criminal No. 324-73)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE —— DISTRICT OF NEW JERSEY

Present: ALDISERT, ADAMS and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ——— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 18, 1974, be, and the same is hereby affirmed.

ATTEST:

THOMAS QUINN
Clerk

February 19, 1975

Order Denying Petition for Panel Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA

v.

NELSON G. GROSS,

Appellant.

Present: ALDISERT, ADAMS and HUNTER, *Circuit Judges.*

SUR PETITION FOR PANEL REHEARING

The petition for panel rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

1. Points 1 and 3-8 of Appellant's petition for rehearing were carefully considered by the Court and found to be without merit.

2. Points 2, 9 and 10 of Appellant's petition for rehearing (concerning the availability of McCrane and new evidence revealed at his two trials) are more properly matters to be brought to the attention of the trial court in a motion under F. R. Cr. P. 33.

3. We express no opinion on the merits of points 2, 9 and 10.

BY THE COURT,

ADAMS
Circuit Judge

Dated: April 2, 1975

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA

v.

NELSON G. GROSS,

Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER and WEIS, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ALDISERT
Judge

Dated: April 2, 1975

* Judges Gibbons & Garth did not participate in the decision of this matter.

Opinion of the United States District Court for the District of New Jersey

UNITED STATES OF AMERICA

v.

NELSON G. GROSS,

Defendant.

Crim. A. No. 324-73.

UNITED STATES DISTRICT COURT,
D. NEW JERSEY.

May 15, 1974.

Jonathan L. Goldstein, U. S. Atty., and *Richard D. Shapiro*, Asst. U. S. Atty., for the United States.

Hannoch, Weisman, Stern & Besser, by *Albert G. Besser*, and *Ronald M. Sturtz*, Newark, N. J., for defendant.

OPINION AND ORDER

WHIPPLE, District Judge:

The defendant Nelson Gross moves this Court for a judgment of acquittal pursuant to Fed.R.Crim.P. 29(c) alleging that the evidence presented in the case was insufficient to sustain his conviction for the offenses charged in the indictment or in the alternative, the defendant moves this Court for a new trial in the interests of justice pursuant to Fed.R.Crim.P. 33.

[1] In ruling on a motion for a judgment of acquittal the test that ought to be applied by the trial judge is that laid down by Judge Prettyman in Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229 (1947):

> . . . a trial judge, in passing upon a motion for a directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. *Id.* 232-233.

In the instant matter, the jury has decided upon the defendant's guilt to what it believed to be beyond a reasonable doubt. The renewal of the defendant's motion for acquittal now is premised on his belief that the jury could not have reached this conclusion rationally on the state of the evidence presented in the case and for this reason the jury's verdict must be overturned, as against the weight of the evidence and as a product of passion and prejudice demanding that a judgment of acquittal be now entered for the defendant.

[2-4] In deciding whether the reasonable juror would have had to have a reasonable doubt concerning the defendant's guilt, the trial court must view the evidence in a light most favorable to the government and give it the benefit of all legitimate inferences. United States v. Hopkins, 354 F.Supp. 634 (E.D.Pa. 1973); Powell v. United States, 135 U.S.App.D.C. 254, 418 F.2d 470 (1969). In the instant case, the defendant bases his motion for a judgment of acquittal on the incredibility of the government's chief witnesses, Leonard Wolfram and William H. Preis, which the defendant believes was established by the thorough cross-examination of Wolfram and by the direct examination of Wolfram's secretary, Ruth Smith, and the Stop and Save Comptroller, Urinyi. In my review of this testimony, I do not consider it inconceivable nor highly improbable that the jury could have rationally believed the testimony of Preis and Wolfram. Further, it is not within the Court's power when ruling on a judgment of acquittal to assess the credibility of the government's witnesses. Its function on this motion is to ponder probabilities, not to reach actual conclusions; the final decision concerning the believability of the government's witnesses rests with the jury. United States v. Allard, 240 F.2d 840 (3rd Cir. 1957); United States v. Morris, 308 F.Supp. 1348 (E.D.Pa. 1970). What the Court does in ruling on the judgment of acquittal is to decide whether a rational juror could find on the state of the evidence that the defendant was guilty beyond a reasonable doubt. This the jury has done and I cannot find its conclusion irrational.

[5] The credibility of witnesses comes within the purview of the trial court however, when it rules on the mo-

tion for a new trial after the jury has rendered its verdict. At that time, it is incumbent on the Court to evaluate and weigh the evidence in order to decide whether the jury's verdict is against the weight of the evidence and whether a miscarriage of justice has occurred. This motion is directed to the conscience of the Court and it must set the jury's verdict aside, when in its review of the facts, the conviction is contrary to the weight of the evidence. United States v. Wilson, 178 F.Supp. 881 (D.D.C.1959).

[6] The jury's verdict, however, is entitled to presumptive validity and the trial court should exercise its authority in this area very sparingly and only in the most exceptional cases when it is convinced that a gross injustice will have been done if it fails to act. United States v. Provenzano, 240 F.Supp. 393 (D.N.J.1965) affirmed 353 F.2d 1011 (3rd Cir. 1965); United States v. Leach, 427 F.2d 1107 (1st Cir. 1970):

> Motions for new trial are directed to the trial court's discretion. Under its broad power, the court may weigh the evidence and consider the credibility of witnesses. The remedy is sparingly used, the courts usually couching their decisions in terms of "exceptional cases," United States v. Pepe, 209 F.Supp. 592, 595 (D.Del.1962), affirmed 339 F.2d 264 (3rd Cir. 1964), "Miscarriage of justice", United States v. Parelius, 83 F.Supp. 617, 618 (D.Haw.1949), and where "the evidence preponderates heavily against the verdict", United States v. Robinson, 71 F.Supp. 9, 10-11 (D.D.C.1947). . . . *Id.* 1111

Opinion of the United States District Court for the District of New Jersey

In reviewing the instant matter, the defendant directs the Court to ten alternative bases for the grant of a new trial. The defendant alleges: (1) that the United States attorney knowingy utilized the perjured testimony of Leonard Wolfram in his case in chief (2) that the Court's admission of Joseph McCrane's Fifth Amendment testimony before a Federal Grand Jury was so prejudicial that it rises to reversible error (3) that the Court erred in allowing the United States Attorney to elicit testimony concerning the defendant's economic status (4) that the Court erred in allowing testimony concerning defendant's compliance or failure thereof with the 1925 Federal Corrupt Practices Act, 2 U.S.C. § 241 et seq. (5) that the United States Attorney engaged in conduct throughout the course of the trial which necessitates prophylatic relief by way of granting the defendant a new trial (6) that the plan for petit jury selection in this District is unconstitutional in that it systematically excludes attorneys, public officials and other persons of economic means (7) that the Court erred in charging the jury to ignore the tax deductibility of certain items listed on Grand Union's Federal Tax Returns (8) that the verdict is clearly against the weight of the evidence (9) that the Court erred in admitting the hearsay testimony of Bernard Striar and Suzanne Phillips Miller concerning their respective conversations with co-conspirators Anthony Statile and Joseph McCrane and (10) that the Court erred in allowing the naming of Anthony Statile in Count I and Joseph McCrane in Count III of the indictment on the eve of trial. These ten bases for a new trial raised by the defendant may be grouped into four categories. The first of these concerns alleged errors committed by the Court in its rulings on evidence in the course of the

trial (Nos. 2, 3, 4 and 9) in its charge to the jury at the close of the case (No. 7) and in its ruling on a pre-trial motion (No. 10). Category two consists of assisting the credibilty of Leonard Wolfram and whether his testimony, apparently believed by the jury, is so infirm as to characterize the jury's verdict as substantially contrary to the weight of the evidence (Nos. 1 and 8). Category three charges prosecutorial misconduct by the United States Attorney and his bad faith reliance on perjured testimony (Nos. 1 and 5). Finally, Category four alleges the unconstitutionality of this District's jury selection plan (No. 6).

[7] The issues raised in Category one of the defendant's motion essentially ask this Court to reconsider its rulings rendered during the course of the trial. The burden rests on the defendant to demonstrate that these previous rulings vitiated the essential fairness of his trial and resulted in a denial of due process. United States ex rel. Darcy v. Handy, 351 U.S. 454, 76 S.Ct. 965, 100 L.Ed. 1331 (1956). The defendant previously objected to these rulings when the issues were originally raised and this Court rejected the defendant's arguments then. At this juncture of the case, wherein the burden which the defendant must sustain is much heavier, he has advanced no new arguments and this Court must therefore reaffirm its previous rulings and deny defendant's motion for a new trial based on these grounds.

In Category two, the defendant properly requests this Court to assess the credibility of the government's witnesses and to determine whether the jury's verdict is contrary to the weight of the evidence. United States v. Zannino, 468 F.2d 1299 (1st Cir. 1972); United States v.

Joines, 327 F.Supp. 253 (D.Del.1971). The major thrust of defendant's motion is directed to the credibility of Leonard Wolfram. His demeanor on the witness stand and his responses to the expert cross examination by the defendant's counsel proved him to be a confused and befuddled witness. His memory was confined to the general sequence of events in February and April of 1973 and frequently failed to recall specific dates, specific documents, and the specific words of conversations. The defendant alleges that the witness had a memory of convenience which remembered only these events which would implicate the defendant in a plot to suborn the perjury of William H. Preis and failed to recollect any event which might indicate his own personal participation in this attempted subornation plot. This Court, however, does not go so far. Assuredly Leonard Wolfram was not a strong witness for the government, his lapses of memory and recall of detail, were a frustrating and faltering aspect of the government's case. His testimony was severely neutralized by the defendant's cross examination.

Leonard Wolfram, however, was not the only government witness nor was he necessarily believed fully and confidently by the jury in order for it to justify its guilty verdict. The testimony of Bernard Striar and William Preis along with other government witnesses was sufficient to justify the jury's verdict and, for this reason, the defendant's motion for a new trial based on Category two must also be denied.

Appended to the defendant's attack on the testimony of Leonard Wolfram, there is a technical argument concerning the legal sufficiency of Count V of that indictment. Count V alleges that the defendant suborned the

perjury of William Preis before a United States Grand Jury as that perjury is described in 18 U.S.C. § 1623, i.e. that Preis knowingly made a false declaration before the Grand Jury.

[8] The offense which Preis committed is relatively new. It was enacted by Congress in 1970 in order to abrogate the so-called two witnesses rule in perjury prosecutions which demanded that the falsity of a perjured statement be established by the testimony of two independent witnesses. Weiler v. United States, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495 (1945); United States v. Alu, 236 F.2d 179 (3rd Cir. 1956); United States v. Mc Ginnis, 344 F.Supp. 89 (S.D.Texas 1972); 1970 U.S.Code Cong. and Admin.News, p. 4007. Accordingly, this Court rejected defendant's requested charge at the close of the case which would have instructed the jury concerning the two witness rule.

The argument which defendant advances against Count V is relatively simple. He reasons that the subornation statute, 18 U.S.C. § 1622, is expressly directed only toward perjury as that crime is defined in 18 U.S.C. § 1621 and not toward the making of the false declaration described in 18 U.S.C. § 1623. As a result, the defendant claims he has been illegally found guilty of an offense which is not a statutory crime. In the alternative, the defendant contends that if the United States Attorney argues that it was clear to all concerned that the subornation charged in the indictment was of perjury pursuant to § 1621 and merely incorrectly stated as § 1623, then the Court erred in its charge to the jury and for this reason the defendant should be granted a new trial.

[9] This Court concludes that neither of the defendant's constructions or explanations for Count V of the indictment is correct. The subornation statute § 1622 reads: "Whoever procures another to commit any perjury is guilty of subornation of perjury." By utilizing the term "any" in its legislative language, Congress clearly intended the subornation statute to apply to all perjury which it might define and not to be restricted or limited in its application merely to the offense described in § 1621. It is also evident that since Congress did not attempt to amend the subornation statute in 1970 to include the subornation of a false declaration that it must have concluded that this offense was already defined in its prior enactment of § 1622 just as 18 U.S.C. § 2, the aiding and abetting statute applies to all substantive offenses of Title 18 whether they were enacted prior or subsequent to the statue. For this reason then, this Court concludes that 18 U.S.C. § 1622 defines the crime of suborning the making of a false declaration as well as the subornation of what was previously known as perjury.

[10] Category three of the defendant's motion alleges gross misconduct by the United States Attorney and, in particular, his knowing reliance on the perjured testimony of Leonard Wolfram. It should be emphatically noted at the outset that the perjured character of Leonard Wolfram's testimony is solely an allegation by the defendant and not an adjudicated matter.

The basis for defendant's allegation is that in the course of eleven lines of transcript, Leonard Wolfram testified to the details of a conversation he had with Nelson Gross in April of 1973. The defendant introduced evidence at trial which tended to demonstrate that the

conversation could not have occurred on the date Wolfram reported. The reason for this was that a topic of their conversation concerned a diary and an entry therein. It was established in the course of the trial that this diary could not have been presented to Gross at the time of this conversation because it was not known to exist until more than one week later. The defendant also contends that the United States Attorney was in a position to know the untruth of Wolfram's testimony at the time of his direct examination since the diary in question was discovered and produced only through the efforts and specific request of the United States Attorney's office. As a result, the defendant concludes that the United States Attorney acted in bad faith by introducing into evidence at the trial, testimony which he knew to be false and because of this prosecutorial misconduct, the defendant should be granted a new trial.

In reviewing this argument, the Court finds it apparent that what defendant nows sees to be the sequence of events in April of 1973 which makes the date and/or substance of Wolfram's reported conversation with Nelson Gross improbable is a product of information which was produced late in the trial in the course of the defendant's case by the testimony of the diary custodian, Mrs. Ruth Smith. It is not apparent to the Court that this same information or perspective on the events of April 1973 was known by the United States Attorney during his direct examination of Wolfram let alone at the outset of the trial. In fact, the United States Attorney in his summation conceded the improbability of the diary's having been presented to Gross at the time of the reported conversation. As to the testimony of Leonard

Wolfram this Court has already had occasion to remark upon the weakness and contradictions inherent therein. Whatever may be the truth value of Wolfram's testimony, the issue here is whether the United States Attorney deliberately procured false testimony from a witness in his conduct of this trial. There are many unanswered questions raised in the trial of any case but the defendant has produced no telling evidence which would inculpate the United States Attorney of such a grievous misconduct as the defendant alleges here.

[11] The other instances of claimed prosecutorial misconduct which the defendant raises on this motion do not rise to the level of misconduct which this Circuit demands before a convicted defendant may be granted a new trial. As the Circuit has indicated, trials are "rarely, if ever perfect." United States v. Leftwich, 461 F.2d 586, 590 (3rd Cir. 1972) and errors or acts committed by counsel both for the government and defense, ". . . do not call for a new trial unless they are so gross as probably to prejudice the defendant and the prejudice has not been neutralized by the trial judge before submission of the case to the jury." *Id.* 590, cited also in United States v. Somers, 496 F.2d 723 (3rd Cir. 1974) cert. pending.

The defendant, citing *Somers, supra,* argues that the United States Attorney was guilty of prosecutorial misconduct and this deprived the defendant of a fair trial. I have carefully reviewed the records in this case and I have concluded that there was no prosecutorial misconduct.

In *Somers,* the Court of Appeals held certain remarks of the prosecutor in his opening statement to the jury

were improper in that they constituted "overly dramatic unnecessary characterizations" of the defendants and their conduct. *Id.* 21-22 and n. 26 (Slip opinion filed March 27, 1974). The Court also found improper two additional comments of the United States Attorney wherein he indicated that he possessed information not in evidence which implicated the defendants. *Id.* 24-25.

In the present case, it should be noted that this was a long trial (five weeks) and hard fought by both sides. The jury heard the testimony of nine government witnesses and 20 defense witnesses, including the defendant himself.

There is nothing in the alleged improper remarks of the United States Attorney that can fairly be construed as a personal attack on the defendant, as comment on evidence outside the record implicating the defendant or as an opinion of the United States Attorney on the defendant's guilt. The defendant uses the phrase "prosecutorial misconduct" as a catchword to reargue the admissibility of certain evidence and the scope of cross-examination of defense witnesses. Falling into this category are such alleged improprieties as the introduction into evidence of Wolfram's "prejured" testimony, McCrane's Fifth Amendment plea before the Grand Jury and defendant's income tax returns and the cross-examination of the defendant and his witnesses concerning defendant's political career, law practice, partnership records and financial status. The areas which the United States Attorney attempted to explore on cross-examination were all "opened up" by defense counsel's direct examination. Since this Court permitted both the introduction of this evidence and this cross-examination,

the United States Attorney can hardly be accused of improper conduct.

In addition, defendant cites a number of instances where the United States Attorney allegedly made statements on evidence outside the record. It should be noted that the defendant's attorney in his cross-examination of government witnesses and the defendant in his own testimony attempted to place the United States Attorney's office on trial by insinuation and innuendo to the effect that the United States Attorney himself suborned perjury. On each occasion when this occurred through cross-examination of government witnesses, defense counsel had no bases in fact for his question. During the course of the defendant's cross-examination he purposely interjected news accounts relating to "warfare" between state and federal law enforcement offices and alleged "leaks" from the United States Attorney's office. On each occasion when this occurred, the defendant's answers were unresponsive to the question posed by the United States Attorney. It is obvious that the testimony pertaining to the unsupported charges of "leaks" and "warfare" between law enforcement offices was totally irrelevant to the guilt or innocence of this defendant on the charges set forth in the indictment.

[12] I recall, during the cross-examination of Bernard Striar, a government witnes, counsel for the defendant asked Striar without any basis in fact if it were true that an assistant United States Attorney had pointed out the defendant to Striar in the courtroom in order to assist the witness in his identification of the defendant. The United States Attorney thereupon objected and rightly so to the question and stated that his office did not engage in such conduct.

Taken in context, the United States Attorney's objection served only to neutralize what I consider to be an unfair question by defense counsel. Counsel then made the surprising suggestion in the jury's presence that the United States Attorney take the stand and testify to rebut the insinuation that he had done something which was tantamount to suborning perjury. The United States Attorney did not launch an attack upon the defendant, as was condemned in *Somers*, but merely defended his office by making which I consider to be proper objection. Defendant was in no way prejudiced by the remark.

[13] I reach the same conclusion as to the question posed by the United States Attorney concerning "leaks" from his office. Here the United States Attorney was provoked by an unresponsive answer of the defendant to the effect that there were "leaks" emanating from his office. Moreover, rather than objecting to the United States Attorney's questions, defense counsel insisted that his client answer them. The defendant appeared to be waiting for an opportunity to inject the issue of "leaks" into the trial.

Shortly thereafter, the defendant gave another unresponsive answer wherein he recalled reading newspaper accounts concerning a so-called war between the United States Attorney's office and the State Attorney General's office over the investigation of the Writer's Associate invoice. The United States Attorney attempted to cross-examine defendant concerning this alleged incident but was prohibited by this Court. However, I do not find anything stated by the United States Attorney which constituted misconduct in the sense of implicating the defendant or expressing an opinion as to guilt. Again I find that defendant was not prejudiced by the incident.

Defendant cites other instances of alleged prosecutorial misconduct. As to the United States Attorney's reference to "arson" during the cross-examination of the defense witness Albanese, I conclude there was no prejudice. I consider this Court's prompt cautionary instructions to be effective and sufficient to protect the defendant. I reach the same conclusion as to the partial question asked of Albert Gross: "Did there come a time when you were personally sued by trustees . . .?" Defense counsel interrupted the question with an objection. Again I consider my stern cautionary instructions sufficient to protect the defendant from any prejudice.

[14] Defendant cites several other alleged instances of prosecutorial misconduct. Many of these were not objected to at trial. Accordingly, the defendant cannot raise them on his post trial motion. See United States v. Somers, *supra* at 29-30; United States v. Lawson, 337 F.2d 800, 807 (3d Cir. 1969) cert. denied 380 U.S. 919, 85 S. Ct. 913, 13 L.Ed.2d 804 (1965). After carefully reviewing this record in its entirety, I conclude there was no "prosecutorial misconduct" and the defendant was not denied a fair trial. As a result defendant's motion for a new trial based on his third category of objections is also denied.

[15] Finally, the defendant raises what he considers to be a serious constitutional infirmity in this District's jury selection plan. He argues that the plan in effect in this District systematically excludes attorneys, public officials, professional or business persons and others of high income.

Whatever merit there may be in defendant's allegation a reading of the precedents available in this Circuit, as

well as in the United States Supreme Court, leads me to conclude that defendant's motion comes too late. Although the precedents that the Court will rely upon deal with the composition of Grand Juries, I consider these cases closely analogous both factually and legally. The selection of petit and grand juries is governed by a single statutory provision 28 U.S.C. § 1867 which requires all objection to the method of the jury's selection be raised prior to the voir dire, 28 U.S.C. § 1867 (a) and (e). As a result, the failure to raise a timely objection on these grounds has been held to constitute a waiver based on policy considerations underlying Fed.R.Crim.P. 12(b)(2), Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973); United States v. Noah, 475 F.2d 688 (9th Cir. 1973); United States v. Zirpolo, 450 F.2d 424 (3rd Cir. 1971). That policy has alternatively been expressed as the need for an orderly process of criminal procedure with sanctions of forfeiture for those who seek to avoid the impact of procedural rules, Fay v. Noia, 372 U.S. 391, 432, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) or finality in criminal judgments, Thornton v. United States, 125 U.S.App.D.C. 114, 368 F.2d 822 (1966). These formalistic considerations, however, have repeatedly been overturned when serious questions concerning the denial of constitutional rights have been asserted, Kaufman v. United States, 394 U.S. 217, 288, 89 S.Ct. 1068, 22 L.Ed. 2d 227 (1968); Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). As the Supreme Court said in *Sanders*: ". . . conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Id.* p. 8, 89 S.Ct. p. 1073.

These legitimate governmental interests in forfeiture and finality have added weight, however, when the convicted criminal defendant alleges unconstitutional composition of a jury in whose selection he actively and vigorously participated. To grant relief in this context would have the Court approve and participate in the defendant's trial tactics which involve the deliberate avoidance of Congressionally approved procedural requirements. If the Court consented to such a course of action, then for every defendant, "(S)trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time . . .", Davis v. United States, 411 U.S. 233, 241, 93 S.Ct. 1577, 1582, 36 L.Ed.2d 216 (1972).

In the present case, this Court will not be a party to these tactics. The defendant here offers no plausible explanation for his failure to make timely objection to the composition of the jury. The method of selecting the jury panel has been utilized in this District since 1968 and it was implemented pursuant to the standards of 28 U.S.C. § 1861 et seq. No reason has been suggested why the defendant or his counsel could not have ascertained the information relative to his present objection prior to trial or, at least, in the course of the very thorough voir dire of each juror individually and in chambers by the Court with the defendant present as well as counsel for the government and the defense. This Court also does not perceive how prejudice to the defendant's right to a fair trial could have resulted from the jury which was actually selected. For these reasons, this Court denies defendant's

motion for a new trial on the basis of his fourth category of objection and it also denies his application for an evidentiary hearing concerning the jury selection practice pursued in this District.

It is, therefore, ordered, this 15th day of May, 1974 that defendant's motion for a judgment of acquittal pursuant to Fed.R.Crim.P. 29(c) and in the alternative for a new trial pursuant to Fed.R.Crim.P. 33 be and the same are hereby denied.

Affidavit of Joseph M. McCrane, Jr.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1697

UNITED STATES OF AMERICA,

v.

NELSON G. GROSS,

Appellant

JOSEPH M. MCCRANE, being duly sworn according to law, deposes and says:

1. That he was named by the Grand Jury as a co-conspirator with Nelson G. Gross in Count 1 of the indictment in United States v. Nelson G. Gross, Criminal Action No. 324-73 in the United States District Court for the District of New Jersey and that he was named as a co-conspirator with Gross by amendment of Count 3 of the same indictment. It is from Gross' conviction on that indictment that this appeal is taken.

2. That he was indicted as of Criminal Action No. 341-73 in the United States District Court for the District of New Jersey two days after Gross had been indicted as mentioned above. Gross was mentioned as a co-conspirator with him in Count 1 of this indictment, which in-

volved, in part, the same matters which were the subject of Gross' indictment.

3. That on April 27, 1973, before either of the above-mentioned indictments was returned by the Grand Jury, he was called before the Grand Jury and exercised his right under the Fifth Amendment not to testify.

4. That during the trial of Nelson Gross on the above-mentioned indictment, his attorney notified counsel for Gross and the government that he would exercise his Fifth Amendment right not to testify if he were called as a witness and, accordingly, that he did not testify in that case.

5. That on December 10, 1974, he was acquitted on Count 1 of the indictment against him, charging a conspiracy to "[d]efraud the United States by impeding, impairing, obstructing and defrauding the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of revenue, to wit, income taxes . . .," essentially the same charge involved in Count 1 of the indictment against Gross and Count 5 charging him with aiding and assisting "The Grand Union Company and its includable subsidaries (including the Stop and Save Trading Stamp Corporation) to prepare and present to the District Director of Internal Revenue . . ." a false and fraudulent corporate income tax return, essentially the charge contained in Count 2 of the indictment against Gross.

6. That, having read the testimony of Preis and the summation of United States Attorney Jonathan Goldstein

at the trial of Nelson Gross, he knows that the verdict was based, at least in part, on incorrect testimony.

7. That, having been acquitted of the charges against him involved in the case against Nelson Gross, he has been advised by his counsel that there is no longer any basis or reason for him to assert his Fifth Amendment right not to testify on behalf of Nelson Gross and that, in order to avoid a miscarriage of justice, he is now prepared to testify as follows:

> "(a) The first time I ever met Nelson Gross was at the 1968 Republican National Convention; and then only very casually. I believe I met him again at the inauguration of President Nixon in January, 1969, and then not again until the June 1969 primary campaign for Governor. Immediately after the June election, I went to a wedding reception for Paul Sherwin's daughter, attended also by Congressman Cahill and Nelson Gross. Mr. Cahill told us then that Mr. Sherwin would be the campaign manager for the fall campaign, that I was to report to Sherwin in my capacity as financial chairman and Nelson Gross was to be State Chairman, but to report to Sherwin for overall direction of the campaign. From that time up to the date of the election in November, our coordination was through Mr. Sherwin and I don't ever remember seeing or talking to Nelson Gross. He attended no finance meetings and I attended no campaign meetings. In fact, we were told to cover separate areas so as not to duplicate our efforts. I did receive certain lists of prospects from Nelson Gross in Bergen County and did receive from him through Mr. Sherwin, the names of Ned Jesser and William

Preis as prospective hosts of fund-raising cocktail parties for Bergen County.

"(b) I visited with Ned Jesser and also visited Mr. Preis separately at his South Hackensack office on August 14, 1969. At that time Mr. Preis agreed to co-host a party and also pledged on behalf of Triple S Blue Stamp Corporation a contribution of $5,000. Mr. Preis asked how the company could fulfill the pledge in a confidential manner so as to avoid possible difficulties with stockholders and customers who did not want support indicated as to any candidate. I said that the corporation could make its payment to Writers Associates which was receiving campaign contributions and paying campaign expenses. At no time was there any discussion of taking a tax deduction for the contribution.

"(c) Sometime after the party at Arcola on September 9 which Mr. Preis co-hosted, although he did not attend, I asked Miss Sue Phillips of Writers Associates whether the $5,000 pledge had been paid. Seeing that it had not been, I asked her to send out a reminder notice. This she did in the form of a Writers Associates invoice, which we used in certain cases to preserve confidentiality because Writers Associates was asigned to pay certain expenses of the campaign. There was no other person or company in Bergen County that received such an invoice, and it happened in this case only because the $5,000 contribution had not been paid though several weeks had passed since the pledge of August 14, 1969.

"(d) At no time did I tell Nelson Gross that a Writers Associates invoice was being sent to Mr. Preis. At no time did Nelson Gross ask me to send Preis a bill, voucher or invoice in any form. In fact, at no time did Nelson Gross have any discussion with me at any time concerning Writers Associates, the payment of bills, or any means by which contributors could obtain tax deductions for campaign contributions. Moreover, to my knowledge, Nelson Gross never knew that Writers Associates even existed or who Dick Smith was."

6. That he has read the testimony of Preis that Nelson Gross told him not to worry because he [McCrane] would "plead the Fifth [Amendment]" before the Grand Jury. With respect to this testimony, he is prepared to testify on behalf of Gross as follows:

"At no time prior to my assertion before the Grand Jury on April 27, 1973, of my right not to testify on Fifth Amendment grounds, did I ever tell Nelson Gross that I would assert such a plea. Indeed, until April 21, 1973, well after Gross' purported statement to Preis, I had not discussed with my attorneys or anyone else what action I would take if I were to be called before the Grand Jury. In fact, I was out of the country on a vacation when a Grand Jury subpoena was served upon my wife on April 6, 1973, and I did not return to the country so that I could discuss this matter with anyone until April 21, 1973."

s/ JOSEPH M. MCCRANE, JR.

(Sworn to February 25, 1975.)